Supreme Court, U.S.
FILED
DEC 27 1996

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STANLEY R. HUTSELL — PETITIONER

V.

RAY SAYRE, an officer of the University of Kentucky Police Department, Individually — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a different standard for determining the existence of probable cause sufficient to support the issuance of an arrest warrant under the Fourth Amendment in an action brought under 42 U.S.C. §1983 than the standard applicable in a criminal action?

2. Did a police officer violate the Fourth Amendment right of a 42 U.S.C. §1983 plaintiff against unreasonable seizure by causing an arrest warrant for the plaintiff to issue based upon the officer's sworn complaint which was insufficient to establish probable cause, where the officer claimed that information known to him but not disclosed under oath to the judge issuing the warrant would have been sufficient to establish probable cause?

3. Is a police officer entitled to qualified immunity for causing a 42 U.S.C. §1983 plaintiff to be arrested upon a warrant secured on the basis of the officer's sworn complaint which was insufficient to establish probable cause under the Fourth Amendment, where the officer claimed that information known to him but not disclosed under oath to the judge issuing the warrant would have been sufficient to establish probable cause?

4. Where a 42 U.S.C. §1983 plaintiff alleges that a police officer violated his Fourth Amendment right against unreasonable seizure by causing an arrest warrant for the plaintiff to issue based upon the officer's sworn complaint which was insufficient to establish probable cause after material false statements in the sworn complaint are excluded from the probable cause determination, is the officer entitled to qualified immunity based on the officer's claim that information known to him but not disclosed under oath to the judge issuing the warrant would have been sufficient to establish probable cause?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were Stanley R. Hutsell (Plaintiff-Appellant); Ray Sayre, individually and in his capacity as an officer of the University of Kentucky Police Department; W.A. Hayes, individually and in his capacity as an officer of the University of Kentucky Police Department; and The Board of Trustees of the University of Kentucky (Defendants-Appellees).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. 1a-22a) is reported at 5 F.3d 996 (6th Cir. 1993).

The opinion of the United States District Court for the Eastern District of Kentucky at Lexington (App. 27a-41a) is unreported.

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In the early morning hours of September 22, 1990 on the campus of the University of Kentucky, Stacey Prieshoff, a female student, was allegedly assaulted by an unknown assailant. Respondent Ray Sayre and other University of Kentucky police officers investigated the reported assault.

At the request of university police, Prieshoff presented herself at the headquarters of the university police department on September 23, 1990 for the purpose of constructing a composite drawing of her assailant. At that time Prieshoff described her attacker as Negro, male, between 21 and 25 years of age, of medium height (5'7"-5'11") and medium build, who had black hair and no moustache. The composite created by Prieshoff with the assistance of a university police officer showed her attacker to be a young male with a full head of dark hair and no moustache.

In his deposition testimony, Sayre stated that he learned that Prieshoff had prepared a composite approximately ten days later, however he never bothered to look at it or the description given by Prieshoff before filing his sworn complaint. Sayre explained his omission by stating that since he already had a suspect (Petitioner Stanley R. Hutsell) and since composites are used to eliminate persons as suspects, he did not feel that the composite was "pertinent" or "necessary" to his investigation.

On September 24, 1990, a university police officer showed Prieshoff a photographic lineup of six black males, with Hutsell's photograph designated as number three. Prieshoff informed the officer that she was "drawn" to photograph number three. Prieshoff went on to state that she could not be 100% certain, but thought that if she could view a physical lineup and be given an opportunity to hear the man's voice she would be "able to do a better job at picking out the person." Sayre admitted that he knew, prior to filing his sworn complaint, that Prieshoff had not positively identified Hutsell.

Also on September 24, 1990, Hutsell was summoned to the university police station. Hutsell was informed that he was a suspect in an attempted rape. Hutsell signed a waiver of his rights and agreed to be interviewed by Sayre and another officer. Hutsell consented to a search of his vehicle. The officers seized a wooden baseball bat and a pair of work gloves from Hutsell's trunk and sent these items to the Kentucky State Police crime laboratory to be analyzed. Sayre filed his sworn complaint before receiving the negative results of the examination.

On December 14, 1990, Sayre approached Judge Thomas Clark of the Fayette County District Court for the purpose of securing a warrant for the arrest of Hutsell for the crime of Criminal Attempt, Rape in the First Degree. Judge Clark issued the warrant on the basis of Sayre's sworn complaint, the affidavit portion of which states in its entirety:

> Affiant's grounds of belief as to the commission of this offense are: The Complainant advises that she was struck from behind by an unidentified object by a subject she later identified. The Complainant then fell to the ground as her attacker covered her face with something clothlike and something firm against her throat. The Suspect then told her "Dont [sic] say a word or I'll have to hurt you, The [sic] Suspect then began removing her short pants and Undergarments. Again the suspect stated "dont [sic] say word Im [sic] not going to hurt you," Just prior to the suspect running from the area.

The criminal case against Hutsell was tried to a jury in state court. On March 28, 1991, Hutsell was acquitted of the charge of Criminal Attempt, Rape in the First Degree.

Hutsell brought this action in the U.S. District Court for the Eastern District of Kentucky at Lexington under 42 U.S.C. §1983. Hutsell invoked the jurisdiction of the district court under 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(3) and (4) which provide

that district courts have original jurisdiction of actions arising under Acts of Congress protecting federal constitutional rights.

In his verified complaint, Hutsell alleged *inter alia* that, by reason of the actions of Sayre, Hutsell was subjected to an unreasonable seizure of his person without probable cause in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. In both the dis .ict court and the court of appeals, Hutsell argued *inter alia* that Sayre's sworn complaint was insufficient to establish probable cause in that (1) it failed to set forth sufficient facts and circumstances so as to allow the magistrate to make an independent evaluation of probable cause and (2) it contained material false statements.

Hutsell's argument was based on the evidence that Sayre knew or reasonably should have known before he filed his complaint that: (1) Prieshoff had not positively identified Hutsell from a photographic lineup, but had stated that she was not 100% sure of the identification and would have to see and hear the suspect to be "able to do a better job at picking the person," and that despite the fact that Hutsell had fully cooperated in the investigation, no attempt was made to provide a physical or voice lineup to Prieshoff, and (2) Prieshoff had not identified Hutsell by her description of her attacker as Negro, male, between 21 and 25 years of age, of medium height and medium build, who had black hair and no moustache, nor identified Hutsell by the composite she had constructed showing her attacker to be a young male with a full head of black hair and no moustache, because Hutsell was a 44 year old black male with graying, balding hair and a moustache.

By stating in his sworn complaint that "the Complainant advises that she was struck from behind . . . by a subject she later identified," Sayre did not provide the magistrate with sufficient underlying information allowing the magistrate to make an independent evaluation of whether, in fact, the Complainant had identified Hutsell as her assailant. *Franks v. Delaware*, 438 U.S. 154, 165, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) Additionally,

under the test of *Franks*[1], it is clear that the statement "the Complainant advises that she was struck from behind . . . by a subject she later identified" was a material false statement made by Sayre knowingly and intentionally or with reckless disregard for the truth. Under the *Franks* rationale, exclusion of that statement from Sayre's sworn complaint left nothing upon which a magistrate could find probable cause to believe that Hutsell committed the charged offense. *Id.*, 438 U.S. at 171-72. On this basis, Hutsell asserted that Sayre had violated his Fourth Amendment right against unreasonable seizure by causing an arrest warrant to issue by submitting a sworn complaint that did not establish probable cause. *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986).

Sayre countered Hutsell's argument by relying on information not contained in the sworn complaint to establish probable cause.[2] Sayre sought to rely both on information of which he allegedly informed Judge Clark and information known to Sayre but not disclosed to Judge Clark. Sayre has never claimed and the record does not disclose that *any* information other than that which Sayre included in his sworn complaint was disclosed under oath to Judge Clark.

Sayre alleged that this other information was included by him in a draft complaint. It was maintained by Sayre that Judge Clark reviewed and rejected this draft complaint and instructed Sayre that it was "too long, that all [Sayre] needed was the Defendant, why [Sayre] named that particular Defendant, and a basic idea of what took place." Sayre went on to testify that Judge Clark did not tell Sayre to take anything specifically out of the draft complaint.

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[1] *See also Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989) (applying the *Franks* test in the context of an action brought under 42 U.S.C. §1983).

[2] Hutsell argued and continues to maintain that, even if considered, this information is insufficient to establish probable cause.

Sayre claimed that he discarded the draft complaint and submitted the revised sworn complaint upon which Judge Clark issued the warrant. Sayre testified as follows concerning what specific facts he related to Judge Clark which were not contained in his sworn complaint:

> . . . we had a young lady that had been attacked, that her attacker had begun to remove her undergarments, that he then advised that he couldn't do that and ran off. We had found a wallet at the scene.
>
> . . .
>
> That the victim had identified her assailant out of a photo lineup. That upon talking to the suspect there were several inconsistencies in his story. That we could not--after the incident itself we could not locate him at what we felt was his address, or thought was his address.

In finding that Sayre was entitled to summary judgment, both the district court (App.36a-40a) and the court of appeals (App.16a-19a) relied upon information within Sayre's knowledge that (1) was not included in the sworn complaint and (2) was either not disclosed to Judge Clark at all or was not disclosed under oath.

REASONS FOR GRANTING THE WRIT

This Court has established that it is a violation of the Fourth Amendment for a warrant to issue in the absence of a showing of probable cause "supported by Oath or affirmation,"[3] that the Fourth Amendment requires that sufficient underlying facts be set out in a warrant affidavit so as to allow the magistrate to make an independent evaluation of probable cause,[4] that the Fourth Amendment is violated when a warrant is issued on the basis of a false statement in an affidavit if the false statement was made knowingly and intentionally or with reckless disregard for the truth and if, absent the false material, the affidavit's remaining content is insufficient to establish probable cause,[5] and that judicial review of a magistrate's probable cause determination must be strictly confined to the information which was appropriately brought to the magistrate's attention.[6] All of these decisions have come in a criminal proceeding deciding a question of suppression of evidence.

Although this Court has never considered the question of whether oral testimony adduced to a judicial officer in an application for a warrant may be considered in supplementation of

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[3] *Nathanson v. United States*, 290 U.S. 41, 47, 78 L.Ed. 159, 54 S.Ct. 11 (1933).

[4] *Franks*, 438 U.S. at 165.

[5] *Franks*, 438 U.S. at 155-156 (the Warrant Clause of the Fourth Amendment "surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .').

[6] *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565, fn. 8, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971)("A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless"); *Aguilar v. Texas*, 378 U.S. 108, 109, fn. 1, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Giordenello v. United States*, 357 U.S. 480, 486, 2 L.Ed.2d 1503, 78 S.Ct. 1245 (1958).

an affidavit which is insufficient to establish probable cause,[7] this question has been considered in the circuits. Citing *Nathanson, supra*, the Eighth Circuit stated in *Frazier v. Roberts*, 441 F.2d 1224, 1227 (8th Cir. 1971), that

> [t]he nearly unanimous view is that the Fourth Amendment requires that only information related to the magistrate on Oath or affirmation is competent upon which to base a finding of probable cause; that unsworn oral statements may not form a basis for that decision.

As support for its statement that this view was "nearly unanimous," the *Frazier* court cited cases from the Fifth, *Sixth* and Seventh Circuits: *Lopez v. United States*, 370 F.2d 8 (5th Cir. 1966); *United States v. Wroblewski*, 105 F.2d 444 (7th Cir. 1939); *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937). Thus, at least until the opinion in the court below, it was established law in the Sixth Circuit that "[t]he Fourth Amendment requires that no . . . warrant issue unless the judicial officer can find probable cause therefor from facts and circumstances presented to him under oath or affirmation." *Sparks* at 64.

The Third Circuit held in *United States Ex Rel. Gaugler v. Brierley*, 477 F.2d 516, 520 (3rd Cir. 1973) that, under the Fourth Amendment, *sworn* oral testimony may supplement an affidavit for a warrant which on its face fails to establish probable cause. The

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[7] *See Christofferson v. Washington*, 393 U.S. 1090, 21 L.Ed.2d 783, 89 S.Ct. 855 (1969)(denying certiorari over the dissent of Brennan, J., joined by Marshall, J., on the question of whether the Fourth Amendment requires that, at or before the time a warrant issues, a permanent record must be made of the evidentiary basis for its issuance).

Third Circuit noted that its decision was in accord with the views expressed by the Second, Eighth, Ninth and Tenth Circuits.[8] *Id.* at 420, 422.

Despite the clearly established law of this Court and a majority of the circuits (including the Sixth Circuit), the Sixth Circuit below affirmed the district court's decision to grant Sayre's motion for summary judgment solely on the basis of information not appearing in Sayre's sworn complaint:

> We believe it a reasonable assumption of probable cause to apply for an arrest warrant existed here, given the facts allegedly contained in the original complaint . . . Absent any evidence from plaintiff to create a genuine issue of fact that Judge Clark did not have full information, we conclude that the district court's ruling was proper.

(App. 17a). Later in its opinion, the Sixth Circuit listed six pieces of information[9] allegedly known to Sayre but either not disclosed to Judge Clark under oath or not disclosed at all. Following this list, the court stated: "In the face of all this information, Sayre clearly had sufficient indicia of probable cause to believe that plaintiff had committed the crime." (App. 18a-19a).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), this Court held that governmental officials performing discretionary functions enjoy qualified immunity only

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[8] Citing *United States Ex Rel. Pugach v. Mancusi*, 411 F.2d 177 (2nd Cir. 1969), *cert. denied*, 396 U.S. 889, 24 L.Ed.2d 163, 90 S.Ct. 172 (1969); *Miller v. Sigler*, 353 F.2d 424 (8th Cir. 1965), *cert. denied*, 384 U.S. 980, 16 L.Ed.2d 690, 86 S.Ct. 1879 (1966); *Frazier v. Roberts*, *supra*; *Boyer v. State of Arizona*, 455 F.2d 804 (9th Cir. 1972); *Sherrick v. Eyman*, 389 F.2d 648 (9th Cir. 1968), *cert. denied*, 393 U.S. 874, 21 L.Ed.2d 144, 89 S.Ct. 167 (1968); *Leeper v. United States*, 446 F.2d 281 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021, 30 L.Ed.2d 671, 92 S.Ct. 695 (1972).

[9] Hutsell disputes the accuracy and sufficiency of this information to support the issuance of a warrant, even if it had been offered under oath.

when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In *Malley v. Briggs*, *supra*, the general *Harlow* standard was phrased in terms of the clearly established constitutional right at issue. The *Malley* court concluded that the standard applied in the context of a suppression hearing, as defined in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677,.104 S.Ct. 3405 (1984), also "defined the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley*, 475 U.S. at 344, Thus, *Malley* held that the question of entitlement to qualified immunity depended on

> . . . whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

Id. at 345.

As evidenced by *Malley*, it has heretofore been the rule that the standard for determining if a constitutional right has been violated is the same whether the question arises in the context of a criminal action or a §1983 action. In a §1983 action, for purposes of determining entitlement to qualified immunity, there is an *additional* determination of whether the constitutional right violated was "clearly established" when the violation occurred.

The Sixth Circuit's opinion below stands for the proposition that a determination of probable cause in a §1983 action differs from such a determination in a criminal action. Where in a criminal action the law is clearly established that it is a violation of the Fourth Amendment for a warrant to issue in the absence of probable cause "supported by Oath or affirmation," the Sixth Circuit has pronounced that, for purposes of determining entitlement to qualified immunity in a §1983 action, information other than that presented under oath to the judge issuing the warrant may be considered in a determination of probable cause.

This Court has never spoken directly to the issue of whether, in an action brought under §1983, information within a police officer's knowledge that was not disclosed under oath by the officer to the magistrate issuing an arrest warrant may be relied upon to establish probable cause or entitle the officer to qualified immunity. The Court should grant review to settle the question and hold that the same standard for determining the existence of probable cause supporting the issuance of an arrest warrant obtains in criminal actions and actions brought under §1983.

CONCLUSION

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-6216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STANLEY R. HUTSELL,
Plaintiff-Appellant,

v.

RAY SAYRE, Badge No. 6545, individually and in his capacity as an officer of the University of Kentucky Police Department; W.A. HAYES, Badge No. 6217, individually and in his capacity as an officer of the University of Kentucky Police Department; and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

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Decided and Filed September 29, 1993.

Before: NELSON and SUHRHEINRICH, Circuit Judges, and EDMUNDS, District Judge.*

SUHRHEINRICH, Circuit Judge. In this §1983 action, plaintiff Stanley R. Hutsell alleges that defendants University of Kentucky police officers Ray Sayre and W. A. Hayes, as well as the Board of Trustees of the University of Kentucky ("UK"), violated his Fourth and Fourteenth Amendment rights by seeking an arrest warrant without probable cause for an assault of a female student on the UK campus. The district court ruled that plaintiff's claims against UK and the officers in their official capacities were barred by the Eleventh Amendment, and that the officers were entitled to qualified immunity in their individual capacities. For the reasons that follow, we **AFFIRM**.

I.

UK student Stacey Prieshoff was assaulted by an unknown assailant on Saturday, September 22, 1990, between 1:30 and 2:00 a.m., on the university campus. Defendant UK police officers Sayre and Hayes were dispatched to the scene shortly after the assault occurred.

Officer Sayre took Prieshoff to the UK Medical Center for examination and treatment of a gash in the back of her head. Prieshoff told Sayre that her assailant struck her in the back of the head with "something." She described her assailant as a black male, 5'10", 170 pounds, medium build, black short afro, stubble on his face, ruddy complexion, no glasses, and wearing a dark jacket, a light colored shirt, and blue jeans.

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*The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

While Sayre and Prieshoff were at the hospital, Hayes investigated the scene of the assault. Two individuals, Michael Fox and Darren Birch, handed Hayes a white bandanna, a shoe and a wallet which they found on the ground. Prieshoff identified the bandanna and the shoes as hers. The wallet contained plaintiff's driver's license and his Lexington transit identification card.

At approximately 5:30 a.m. that morning, Hayes telephoned plaintiff's residence, but received no response. Later that morning, two other officers went to two addresses listed on plaintiff's identification cards. Hutsell was at neither. The pair then proceeded to the Lexington Transit Bus Garage where plaintiff worked. They were informed that he was not scheduled to work that day.

The next day, September 23, 1990, Prieshoff went to the UK Police Department to assist in the construction of a composite drawing of her assailant. Sayre testified that Prieshoff identified her assailant as Negro, male, between 21 and 25 years of age, medium build, and black hair. At the time, plaintiff, a black male, was 44 years old, with balding gray hair and a mustache.

On September 24, 1990, Hayes ran a criminal history check on plaintiff, which revealed that plaintiff had a previous arrest for criminal solicitation-prostitution. Hayes obtained a photograph of plaintiff from Lexington Metro Central Records and, with the assistance of Lexington-Fayette Urban County Police Department, prepared a photographic lineup of plaintiff and five other black males with a history of arrests or convictions for sexual offenses, and who resembled plaintiff in appearance.

That afternoon, Hayes went to Prieshoff's apartment with the photographic lineup. Prieshoff selected plaintiff's

photograph as most resembling her assailant; however, she told Hayes that she could not be "100% certain" because it was more difficult to identify someone in a photograph than in person. Prieshoff explained "that was the person, you know, out of the line-up [sic], I was drawn to that picture and I felt that, you know, he was-- he was the one."

Also on the morning of the 24th, Hayes reached plaintiff by telephone, informed him that his wallet had been found and requested that plaintiff come to the station to identify it. When Hutsell appeared, he was advised that he was a suspect in an attempted rape and was advised of his rights. Plaintiff agreed to be interviewed by Hayes and Sayre. He told the officers that his wallet had been missing since Thursday, September 20, 1990. Plaintiff stated that he thought he had lost it at the UK hospital while visiting his wife, who was a patient there. Sayre subsequently checked the hospital's records; plaintiff's wife had not been a patient there since 1986. Plaintiff also consented to a search of his vehicle. The search of his vehicle revealed a baseball bat and work gloves in his trunk.

Hayes's involvement on the case ended on September 26, 1990. Sayre continued to investigate the matter. He interviewed Fox, who told Sayre that Prieshoff had stated that a black man attempted to rape her and struck her in the back of the head with "a bat or something like that."

Based upon this information, Sayre approached Fayette District Judge Thomas Clark in order to obtain a criminal complaint against plaintiff. Judge Clark issued a warrant for plaintiff's arrest on December 14, 1990, after reviewing Sayre's affidavit and revised complaint.

Plaintiff was indicted and tried in state court. On March 26, 1991, he was acquitted of the charge of Criminal Attempt,

Rape 1st Degree. Plaintiff brought this suit on September 23, 1991, in federal court under 42 U.S.C. §1983, alleging that UK and its agents, Hayes and Sayre, violated his Fourth and Fourteenth Amendment rights by obtaining an arrest warrant without probable cause and seeking money damages. The district court dismissed the action and this appeal followed.

II.

A.

Because plaintiff's suit implicates the Eleventh Amendment, which presents a potential jurisdictional bar,[1] and Congress has not abrogated state sovereign immunity in suits under 42 U.S.C. §1983, *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 940-41 (6th Cir.1990) (citing *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979)), we begin our analysis here. It is well-settled that "'a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.'" *Cowan*, 900 F.2d at 940 (quoting *Quern*, 440

[1] The "atypical" jurisdictional bar of the Eleventh Amendment concerns individual claims, not entire cases. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 337 (6th Cir.1990) (citations omitted).

U.S. at 337, 99 S.Ct. at 1143).[2] This bar against suit also extends to state officials acting in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).

When suit is brought against a public agency or institution, and/or its officials, "the application of the Eleventh Amendment turns on whether said agency or institution can be characterized as an arm or alter ego of the state, or whether it should be treated instead as a political subdivision of the state." *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir.1984) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977)), *cert. denied*, 469 U.S. 1113, 105 S.Ct. 796, 83 L.Ed.2d 789 (1985). *See also Estate of Ritter v. University of Mich.*, 851 F.2d 846, 848 (6th Cir.1988) (federal question of whether the Eleventh Amendment is applicable entails consideration of the status of the state agency under state law). The most important factor in resolving this question, however, is whether any monetary judgment would be paid out of the state treasury. *Ritter*, 851 F.2d at 850 (citation omitted).

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[2] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of Any Foreign State.

U.S. Const. amend. XI. Although the text of the amendment suggests that only citizens of another state are barred from suing a state in federal court, it has long been held that the amendment also prohibits suits by a citizen against his own state. *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)).

That UK is considered an arm of the state under state law and not merely a political subdivision is apparent from the statutory scheme which governs it. To begin with, the university's statutory existence is found in Chapter 164 of the Kentucky Revised Statutes, which is entitled "State Universities and Colleges; Regional Education; Archaeology." It is required by statute that UK "be maintained by the state with such endowments, incomes, buildings and equipment as will enable it to do work," Ky.Rev.St.Ann. §164.100, and that it "shall be the principal state institution for the conduct of statewide research and statewide service programs and shall be the only institution authorized to expend state general fund appropriations on research and service programs of a statewide nature financed principally by state funds." Ky.Rev.Ann. §164.125(2). *Cf. Hall*, 742 F.2d at 303 (MCO is included in definition of "state university or college" found in §3345.12(A)(1), and the school is governed by the provisions of Revised Code chapter 3345, entitled "State Universities--General Powers").

More importantly, any claim for money damages against the UK, to the extent authorized, is classified by statute as a claim against the state treasury. Chapter 44, "Claims Upon the Treasury," states in pertinent part that:

> **44.073 State institutions of higher education declared agencies of state government; jurisdiction of board of claims; sovereign immunity.** (1) *For purposes of KRS 44.072, state institutions of higher education under KRS Chapter 164 are agencies of the state.* (Emphasis added).

Section 44.072 authorizes claims for negligence against the Commonwealth, or any of its agencies, departments, officers

or employees, but expressly reserves sovereign immunity[3] "in all situations except where sovereign immunity is specifically and expressly waived as set forth by statute." Ky.Rev.St.Ann. §§44.072;[4] 44.073(8).[5] *See also* Ky.Rev.St.Ann.

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[3]The doctrine of state sovereign immunity "has enjoyed a long and well-established history in Kentucky," *Kestler v. Transit Auth. of N. Ky.*, 758 S.W.2d 38, 39 (Ky.1988), and is "deeply implanted in the law of the Commonwealth through Section 231 of the Kentucky Constitution." *Id. See also Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky.1990) (Kentucky Constitution does not by its express terms elevate common law sovereign immunity to the status of a constitutional principle, but §231 is recognized as constitutionally protecting sovereign immunity in "suits against the Commonwealth" because otherwise it has no meaning). Section 231 of the Constitution provides that "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Thus, §231 authorizes the General Assembly to limit or eliminate the protection of sovereign immunity to the extent it exists, whenever its deems it necessary. *Berns*, 801 S.W.2d at 329; *Kestler*, 758 S.W.2d at 39.

[4]Ky.Rev.St.Ann. §44.072 reads in full:

> **44.072. Legislative intent as to sovereign immunity in negligence claims.** It is the intent of the general assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents or employes while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies to be able to assert their just claims as herein provided. *The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the general assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employes while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute.* The board of claims shall have exclusive jurisdiction to hear claims for

(continued...)

§§164.939-.944 (creating insurance fund for health care malpractice claims or judgments against university "itself" or its agents). *Cf. Ritter*, 851 F.2d at 849 (finding significant that if this case had been litigated in state judicial system, it would have been required to be litigated in the court of claims, as a claim against the state for retroactive monetary relief).[6]

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[4](...continued)

damages, except as otherwise specifically set forth by statute, against the Commonwealth, its cabinets, departments, bureaus, agencies or any of its officers, agents or employes while acting within the scope of their employment by the Commonwealth, its cabinets, departments, bureaus or agencies. (Emphasis added).

[5] Ky.Rev.St.Ann. s 44.073(8) states:

(8) No action for negligence may be brought in any court or forum other than the board of claims against the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employes while acting within the scope of their employment by the Commonwealth, or any of its cabinets, departments, bureaus or agencies.

[6]The legal climate in which Ky.Rev.St.Ann. §§ 44.072 and 44.073 was enacted further supports this conclusion. In 1986, the Kentucky Supreme Court held in *Dunlap v. University of Ky. Student Health Services Clinic*, 716 S.W.2d 219 (Ky.1986), that the UK Medical Center Malpractice Insurance Act constituted a partial waiver of sovereign immunity for the hospital to the extent that an insurance fund for health care malpractice claims or judgments had been provided for by statute. The statute at issue read:

Legislative purpose - It is the purpose of KRS 164.939 to 169.944 to promote the health and general welfare of the people of the Commonwealth by authorizing the University of Kentucky to establish from its own funds other than general tax revenues a basic coverage compensation fund *to assure itself* that health care malpractice *claims or judgments against itself*, or its agents will be satisfied. Such

(continued...)

Section 164.2871 of the Kentucky Revised Statutes, which allows UK to purchase liability insurance for its individual trustees, faculty and staff, does not alter the analysis. That section explicitly states that except as provided in Chapter 44, the purchase of liability insurance by the governing board, of each state institution for members of governing boards, faculty and staff, *shall not be construed to be a waiver of sovereign immunity or any other immunity or privilege.* Ky.Rev.St.Ann. §164.2871(3) (as amended in 1988) (emphasis added). In *Cowan*, 900 F.2d 936, which involved a suit against the University of Louisville School of Medicine

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[6](...continued)

> purpose is hereby declared to be a public purpose for which public funds may be expended.

Dunlap, 716 S.W.2d at 220 (quoting Ky.Rev.St.Ann. §164.939; emphasis supplied by *Dunlap* court). The *Dunlap* court stated that "[f]rom the words of this statute, a limited legislative waiver is plain in its meaning and intent. The only question is whether the statutory language is so imprecise that it fails to accomplish its purpose." *Id.* The court observed that the statutory scheme authorized the Board of Trustees, in its discretion, to create and maintain a basic coverage compensation fund for itself and its agents, to be used "solely in payment of claims for liability arising in favor of any patient" treated by the university or its agents. *Id.* The court rejected the defendant's position that the language of the statute meant only that the fund was intended to provide coverage of physicians and other employees, but not for claims directly against the university, since the Act "specifie[d] in three or more places that it is intended to provide a fund for the University to pay claims against 'itself' as well as its agents." *Id.* at 221.

In direct response to *Dunlap*, the General Assembly enacted §44.072 and §44.073. *University of Louisville v. O'Bannon*, 770 S.W.2d 215, 216 (Ky.1989). The specificity of these statutes leads to the conclusion that the General Assembly wished to insulate UK, and therefore the Commonwealth from suit in all but very limited circumstances, none of which are at issue here.

for wrongful dismissal, we stated with respect to the foregoing emphasized language:

> This statute is hardly what the Supreme Court envisioned when it wrote "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1361 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)). Needless to say, we find plaintiff's argument that Kentucky has consented to this suit unconvincing.

Cowan, 900 F.2d at 941. Given that UK also qualifies as "a state institution of higher education," our interpretation of §164.2871 applies with equal force here.

In support of his argument that UK is not a state agency for purposes of Eleventh Amendment immunity, plaintiff relies on *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky.1990).[7] In *Berns*, the plaintiff sued for negligence in state court, the Kentucky Center for the Arts ("KCA") after he slipped and fell on KCA's premises. The Kentucky Supreme Court held that KCA is not under the "direction and control of the central state government" and can not therefore be considered the "Commonwealth" under the Kentucky Constitution for purposes of sovereign immunity. The court reasoned that KCA was created to "serve as a catalyst in the development of Louisville and Jefferson County as a major

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[7]According to *Berns*, sovereign immunity extends only to those agencies "which are under the direction and control of the central State government and are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury." *Berns*, 801 S.W.2d at 331.

convention and entertainment center ...," Ky.Rev.St.Ann. §153.410, and was "not created to discharge any 'governmental function' in the context in which §231 of the Constitution was written." *Berns*, 801 S.W.2d at 330. The court noted that KCA was a "body corporate with full corporate powers," *id.* (quoting Ky.Rev.St.Ann. §153.420), to "issue revenue bonds solely payable from the charges, revenues, rentals and other funds pledged for their payment"; to levy a surcharge on tickets to contribute to revenue; and to "have exclusive control of all exhibitions, performances and concessions in the center." *Id.* Additionally, all funds and monies collected by KCA were to be turned over to KCA to be used to defray its costs. *Id.*

The court therefore concluded that KCA, which performs substantially the same functions as any private business engaged in the entertainment business, "albeit in the name of promoting tourism and thus the economic welfare of Louisville and Jefferson County" compelled the conclusion that "our constitutional fathers would not view this activity as qualifying for sovereign immunity." 801 S.W.2d at 331.[8]

We are not persuaded. In contrast with entertainment, higher education has long been recognized as a governmental function. *Hall*, 742 F.2d at 305; *Ranyard v. Board of*

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[8]In *dicta*, the *Berns* court stated that the language in Ky.Rev.St.Ann. §153.430(3), "directing the procurance of insurance," despite §44.073, did not change the rule of *Taylor v. Knox County Bd. of Educ.*, 167 S.W.2d 700 (Ky. 1942) and *Green River Dist. Health Dep't v. Wigginton*, 764 S.W.2d 475 (Ky.1989), and *Kestler v. Transit Auth. of N. Ky.*, 758 S.W.2d 38 (Ky.1988), cases deciding there was a statutory waiver because of statutes authorizing or directing the purchase of liability insurance.

In both *Wigginton* and *Kestler*, however, the causes of action accrued before the enactment of Ky.Rev.St.Ann. §§ 44.072 or 44.073, which was held to have no retroactive application.

Regents, 708 F.2d 1235, 1239 (7th Cir.1983) (and citations therein). Although UK's Board of Trustees is designated as a "body corporate," it does not have "full" corporate powers like KCA. Further, unlike KCA, UK "shall be maintained by the state" through endowments and incomes. Ky.Rev.St.Ann. §164.100. *Cf. Hall*, 742 F.2d at 304 (noting that Ohio legislature is required to support Medical College of Ohio "'by such sums and in such manner as it may provide, but "[s]upport may also come from other sources'" (quoting Ohio Rev.Code Ann. §350.05)). All monies collected by UK are deemed "state funds." *See* Ky.Rev.St.Ann. §446.010(31),[9] to be placed in a "depository bank," designated by the treasurer of the Commonwealth "as appropriate for receiving public moneys." *Id.* §164A.550(4). We viewed a similar configuration under *Hall* as merely a convenience, not as an abdication of state control over such funds. *See Hall*, 742 F.2d at 304 ("By statute, the Ohio legislature *permits* state colleges and universities to retain such funds, rather than require them to be paid into the treasury and then appropriated back to the schools as needed, but it could just as easily amend the statute to require the converse.").

Unlike KCA, and contrary to plaintiff's assertion, the Board of Trustees does not operate independently of the central state government. As pointed out by defendant, policy-making for

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[9] "State funds" or "public funds" are defined as:

> [S]ums actually received in cash or negotiable instruments from all sources unless otherwise described by any state agency, state-owned corporation, university, department ... whether or not the money has ever been paid into the treasury and whether or not the money is still in the treasury if the money is controlled by any form of state organization....

Ky.Rev.St.Ann. §446.010(31).

the university is vested in the State Council on Higher Education, not the Board. *See* Ky.Rev.St.Ann. §164.020(1)-(9). UK as a state university reports through the State Council on Higher Education to the Office of the Governor. Ky.Rev.St.Ann. §12.028(1). Finally, UK's finances, as earlier noted, are considered state funds, and its budget is submitted and approved by the legislature as part of the Governor's executive budget. Ky.Rev.St.Ann. §164.020(4)(c). Once budgeted, UK receives an appropriation from the state treasurer in "any amounts due by virtue of the state appropriation." Ky.Rev.St.Ann. §164A.555. A statutory scheme then dictates how the UK is to manage its budget and appropriate funds. *See* Ky.Rev.St.Ann. §§ 164A.550-.630. Thus, we believe that even under a *Berns* analysis, UK would be considered an arm of the state for purposes of state sovereign immunity. *See United States Pipe & Foundry Co. v. Johnson*, 927 F.2d 296, 298 (6th Cir.1991) (although not dispositive, state law immunity is given great weight by federal court in determining Eleventh Amendment immunity).

In summation, we conclude that a suit against the UK Board of Trustees and its employees in their official capacity is fairly characterized as a suit against the "state" for purposes of Eleventh Amendment immunity. The district court therefore properly dismissed the claims against UK and its officials.[10]

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[10]We also note that the state is not considered a "person" under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

B.

This leaves plaintiff's claim against the officers in their individual and personal capacities, for which the Eleventh Amendment provides no immunity. *Hafer v. Melo*, --- U.S. ----, ----, 112 S.Ct. 358, 364, 116 L.Ed.2d 301 (1991); *Scheuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Moreover, because they are sued in their individual capacities, defendants are considered "persons" within the meaning of §1983. *Hafer*, --- U.S. at ---- - ----, 112 S.Ct. at 362-63.

Defendants may, however, assert the defense of qualified immunity to the extent that their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The proper analysis for a defendant's entitlement to qualified immunity consists of: (1) whether the plaintiff has asserted a violation of known civil constitutional right; and (2) whether the constitutional right was so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights. *Siegert v. Gilley*, --- U.S. ----, ----, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). A court must rule in the affirmative on the first issue before considering the second. *Id.* Our review is de novo. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 339 (6th Cir.1990).

Plaintiff claims that the manner in which defendants investigated his involvement in the assault on Prieshoff, which culminated in his being charged with and tried for attempted rape in the first degree, violated clearly-established

constitutional rights of which a reasonable officer would have known. Plaintiff attacks: (1) the affidavit signed by Sayre when he applied for plaintiff's arrest warrant, which plaintiff claims failed to establish probable cause; and (2) the photographic identification procedure used by Hayes as impermissibly suggestive. We address each specific contention in turn.

1.

If a police officer obtains a warrant through material false statements made either knowingly or in reckless disregard for the truth, he may be sued for under §1983 for a Fourth Amendment violation. *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir.1989) (citations omitted). Police officers are entitled qualified immunity however, unless the warrant is so utterly lacking in probable cause that no officer of reasonable competence would have concluded that a warrant should issue. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir.1989).

Plaintiff's attack on the affidavit is threefold: (1) that a reasonable officer in Sayre's position would have known that the portion of the affidavit swearing that "the Complainant advises that she was struck from behind ... by a subject she later identified" does not provide enough facts for a reasonable judicial officer to conclude that Prieshoff identified plaintiff; (2) that a reasonable officer would have known that the complaint, by omitting plaintiff's name in the charging portion, failed to identify plaintiff as the individual to be charged with the claimed offense; and (3) assuming the affidavit did identify plaintiff as the subject Prieshoff later identified, a reasonably well-trained officer in Sayre's position would have known that statement to be false.

As to the sufficiency of the affidavit, Sayre testified that Fayette County Judge Clark was present (although in and out) while Sayre was preparing the affidavit and complaint, and asked him questions about the case. Sayre stated that his first complaint included information that plaintiff's wallet was found at the scene of the crime where a young lady was attacked, that Prieshoff identified plaintiff as her assailant out of a photographic lineup, that after the incident plaintiff could not be located at his address, and that plaintiff gave inconsistent statements during the investigation. Sayre also testified that Judge Clark reviewed the first complaint and instructed Sayre to shorten the complaint to "just specifically what happened and specifically where it happened and who was involved." We believe it a reasonable assumption of probable cause to apply for an arrest warrant existed here, given the facts allegedly contained in the original complaint; and that a reasonable officer in Sayre's shoes would have gone forward with the revised complaint after he had been explicitly instructed by a judge to shorten it after the judge had reviewed the original. Absent any evidence from plaintiff to create a genuine issue of fact that Judge Clark did not have full information, we conclude that the district court's ruling was proper. *Cf. Yancey*, 876 F.2d at 1243 (material issue of fact existed as to whether probable cause for issuance of search warrant would have existed but for disputed statement of police officer where issuing judge expressed uncertainty in his deposition as to what he was told by officer).

Plaintiff's assertion that the charging portion of the criminal complaint were insufficient to establish probable cause is patently ridiculous. Plaintiff's name appeared at the top of

the single page document and that the blank space was immediately preceded by the wording "the above named."[11] Its meaning was clear.

The gist of plaintiff's third argument is that a reasonable officer would have known that the statement that Prieshoff "identified" complainant was false and intentionally reckless because Sayre knew before filing the affidavit that (1) Prieshoff had not positively identified plaintiff, but had stated that she was not 100% sure of the identification, absent hearing and seeing the suspect; (2) Prieshoff had described her assailant as a 21-25 year old black male without a mustache and that plaintiff was a 44-year-old, graying, balding, black male with a mustache.

Although Prieshoff's description was not identical to that of plaintiff's, it was not so far off the mark as to render the statement in the affidavit in reckless disregard for the truth. See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (affidavits are to be evaluated in common sense, rather than hypertechnical manner). The statement was bolstered by Sayre's additional knowledge that: (1) plaintiff's wallet was found at the scene of the assault; (2) plaintiff could not be located on the morning of the attack; (3) he had been previously arrested for a sexual offense; (4) the assault victim identified plaintiff in a photographic lineup; (5) plaintiff had given inconsistent statements to investigating officers; and that, (6) plaintiff had a baseball bat in his trunk

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[11]The complaint stated in pertinent part:

> The affiant, Ofc. R. Sayre UKPD says that on the 22nd day of September, 1990, in Fayette County, Kentucky, the above named _____ unlawfully Committed the Act of Criminal Attempt Rape in the First degree.

and that UK student Fox had stated that Prieshoff thought she had been hit with a bat. In the face of all this information, Sayre clearly had sufficient indicia of probable cause to believe that plaintiff had committed the crime. The district court correctly determined that plaintiff failed to raise genuine issues of material fact that the statements made in the affidavit were false or in reckless disregard of the truth. *See Yancey*, 876 F.2d at 243 (generally presence of probable cause is jury question unless there is only one reasonable determination).

2.

Plaintiff argues that the composite Prieshoff constructed of her assailant would have ruled him out as a subject; and secondly, that plaintiff's photo "stood out" because his mustache was less prominent than the others, his skin tone much darker, and that some of the other photos were obscured by dark shadows.

The Supreme Court has held that whether a defendant's due process rights are violated by the admission at trial of an unnecessarily suggestive lineup depends upon the totality of the circumstances surrounding the lineup or confrontation. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the court described its holding in *Stovall* "as protecting an *evidentiary* interest," *id.* at 113, 97 S.Ct. at 2252, and stated that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113, n. 3, 97 S.Ct. at 2252, n. 3. This led the Seventh Circuit in *Hensley v. Carey*, 818 F.2d 646 (7th Cir.), *cert. denied*, 484 U.S. 965,

108 S.Ct. 456, 98 L.Ed.2d 395 (1987), a §1983 action for an allegedly improper lineup, to state that:

> the procedural safeguards established in *Brathwaite* and *Stovall* protect only against the admission of unreliable evidence at trial and does [sic] not establish a constitutional right to be free of suggestive lineups.... The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under §1983.

Id. at 648-49.[12] The court therefore held that "*Stovall* and *Brathwaite* do not establish a right to an impartial lineup as long as the evidence gained through that lineup is not used at trial." *Id.* at 650. Thus, the defendants in *Hensley* could not have violated the plaintiff's constitutional rights since the plaintiff was never tried; and the plaintiff had no cause of action for being wrongly incarcerated for over 100 days. *Id. See also Sejnoha v. City of Bisbee*, 815 F.Supp. 1300, 1302-03 (D.Ariz.1993); *Haupt v. Dillard*, 794 F.Supp. 1480 (D.Nev.1992); *Mack v. Butler*, 742 F.Supp. 1007 (N.D.Ill.1990); *Willis v. Bell*, 687 F.Supp. 380 (N.D.Ill.1988). However, the court did leave open the possibility that in extraordinary circumstances, such as

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[12]The *Hensley* court analogized to cases which hold that a *Miranda* violation, without additional evidence of police coercion giving rise to a constitutional violation, does not state a cause of action under §1983. *Hensley*, 818 F.2d at 649-50. *See also Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992); *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436 (8th Cir.), *cert. denied*, 490 U.S. 1091, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989).

coercion or other police misconduct, a cause of action under §1983 might be stated. *See id.* at 650 n. 4.

Although this case is distinguishable from *Hensley* to the extent that Hutsell was tried, and the lineup was presumably used at trial,[13] this difference fails to save his claim. Plaintiff's complaint alleges that the manner in which Hayes conducted the photographic lineup caused plaintiff to be "unreasonably seized without probable cause and deprived of his liberty without due process of law in violation of the 14th Amendment." As in *Hensley*, plaintiff is not challenging a violation of the core right to a fair trial, but merely the purported violation of a prophylactic rule which resulted in the deprivation of his liberty. Nor has he alleged any extraordinary circumstances which would give rise to a constitutional violation. Having failed to state a claim for an alleged violation of a known constitutional right, our inquiry is at an end. *Siegert*, --- U.S. at ----, 111 S.Ct. at 1793.

Were we to evaluate the lineup, we would hold that the photo lineup was not unduly suggestive. As observed in *Hensley*, "[t]he police are not required to conduct a search for identical twins in age, height, weight or facial features ... [w]hat is required is the attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of the circumstances' to secure such result." *Hensley*, 818 F.2d at 650 (citation omitted). The six photos were of men who bore a resemblance to plaintiff and who had a record for previous sexual offenses. Furthermore, the fact that plaintiff's wallet was found at the scene of the assault made it perfectly reasonable to include his picture in the lineup. The totality

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[13]There is no evidence in the record before us on appeal on this point.

of circumstances support the district court's finding that the lineup was not unduly suggestive.

C.

Lastly, plaintiff claims that the district court erred in denying his motion for leave to file a second amended complaint in order to add a state law claim for malicious prosecution and a federal claim under 42 U.S.C. §1983 against officer Hayes for conspiring with officer Sayre to give false testimony to the grand jury in violation of plaintiff's Fourteenth Amendment rights. In light of our conclusion that the officers are entitled to qualified immunity on the Fourth Amendment issue, the proposed amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 180, 83 S.Ct. 227, 229, 9 L.Ed.2d 222 (1962).

For all the foregoing reasons, the judgment of the district court is AFFIRMED.

FILED
SEP 29 1993
LEONARD GREEN, Clerk

Eastern District of Kentucky
FILED
OCT 25 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 92-6216

STANLEY R. HUTSELL,
Plaintiff - Appellant,

V.

RAY SAYRE, Badge No. 6545, individually and in his capacity as an officer of the University of Kentucky Police Department; W.A. HAYES, Badge No. 6217, individually and in his capacity as an officer of the University of Kentucky Police Department; and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY,
Defendants - Appellees.

Before: **Nelson** and **Suhrheinrich**, Circuit Judges;
and **Edmunds**, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Issued as Mandate: 10/22/93

COSTS: No Costs

Filing Fee .....$

Printing .....$

Total .....$

A True Copy.

Attest:

/s/ Diane Schnur

Deputy Clerk

Eastern District of Kentucky
FILED
AUG 20 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-448

STANLEY R. HUTSELL, PLAINTIFF

V. **ORDER AND JUDGMENT**

RAY SAYRE, ET AL., DEFENDANTS

* * * * * * * * * * *

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED and **ADJUDGED**, as follows:

1. The Defendants' motion to dismiss Plaintiff's claims against UK and against its agents, Police Officers Ray Sayre and W. A. Hayes, in their official capacities, on the grounds of Eleventh Amendment immunity is **GRANTED**.

2. The motion of the individual Defendants, Police Officers Ray Sayre and W. A. Hayes, for summary judgment on the grounds that they are entitled to qualified immunity on

Plaintiff's claims against them in their individual capacities is **GRANTED**.

3. Plaintiff's motion for leave to file a Second Amended Complaint for the purpose of clarifying his federal claims and to add a pendent state claim for malicious prosecution is **DENIED AS MOOT**. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

4. This action is **DISMISSED** and **STRICKEN** from the docket.

This 20th day of August, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

Eastern District of Kentucky
FILED
AUG 20 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-448

STANLEY R. HUTSELL, PLAINTIFF

V. **MEMORANDUM OPINION AND ORDER**

RAY SAYRE, ET AL., DEFENDANTS

* * * * * * * * * * *

I. INTRODUCTION

Plaintiff brings this action under 42 U.S.C. §1983, against Ray Sayre, individually and in his official capacity as a police officer of the University of Kentucky Police Department; W.A. Hayes, individually and in his official capacity as a police officer of the University of Kentucky Police Department; and the Board of Trustees of the University of Kentucky ("UK"). Plaintiff alleges that the Defendants violated his constitutional rights in respect to the manner in which they investigated an assault occurring to a UK female student on September 22, 1990, resulting in his being charged

by a Fayette County Grand Jury with Criminal Attempt: Rape in the First Degree. On March 26, 1991, Plaintiff was tried by the Fayette Circuit Court and was acquitted by the jury on this offense.

Plaintiff alleges that the manner in which the Defendants investigated the assault of the UK female student on UK's campus on September 22, 1990, subjected him to an unreasonable seizure of his person without probable cause, in violation of his Fourth and Fourteenth Amendment rights, and resulted in his having to employ counsel to defend the criminal action in Fayette Circuit Court. Plaintiff seeks $100,000.00 in compensatory damages, reimbursement of the $2,500.00 in attorney's fees he incurred in defending the criminal action, punitive damages of $50,000.00, and his costs and attorney's fees.

This matter is before the court on the Defendants' motion to dismiss and for summary judgment. The Defendants take the position that Plaintiff's claims against UK and the UK police officers Sayre and Hayes in their official capacities are barred by the Eleventh Amendment; therefore, these claims should be dismissed. Defendants further assert that UK police officers Sayre and Hayes enjoy qualified immunity on Plaintiff's claims against them in their individual capacities; therefore, they are entitled to summary judgment. This motion is fully briefed and is ripe for consideration.

II. DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

A. The Eleventh Amendment/Sovereign Immunity Defense

The Defendants have moved to dismiss this action against UK on the grounds that Plaintiff's claim against UK is barred by the Eleventh Amendment of the United States

Constitution. Relying on the Eleventh Amendment, the Defendants also assert that Plaintiff's claims against the UK police officers in their official capacities are likewise barred by the Eleventh Amendment.

An action against an individual in his official capacity is another way of pleading an action against an entity of which the officer is an agent. Kentucky v. Graham, 473 U.S. 159 (1985). In this respect, an individual who is sued in his official capacity may assert the same immunities which the entity asserts. Id. at 167.

Thus, the crux of Defendants' motion to dismiss turns on whether UK is "an arm of the state," which would entitle it to sovereign immunity under the Eleventh Amendment. Based on a review of recent case law from the United States Court of Appeals for the Sixth Circuit, the court concludes that UK is entitled to sovereign immunity under the Eleventh Amendment for claims made against it under 42 U.S.C. §1983. Cowan v. University of Louisville, School of Medicine, 900 F.2d 936, 940-41, 941 n. 1 (6th Cir. 1990); Ritchie v. Wickstrom, 938 F.2d 689, 692 (6th Cir. 1990); Martin v. University of Louisville, 541 F.2d 1171, 1174-77 (6th Cir. 1976).

In response, Plaintiff asserts that UK is not "the state" for purposes of Eleventh Amendment immunity, as "the state" is defined in Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). Plaintiff also relies on Kentucky Center for the Arts v. Berns, Ky., 801 S.W.2d 327 (1991), which held that the Kentucky Center for the Arts in Louisville, Kentucky, is not a state agency.

Discussion

In Will v. Michigan Dept. of State Police, supra, the United States Supreme court held "that neither a State nor its officials acting in their official capacities are 'persons' under §1983." Id. at 71. Therefore, under Will, Plaintiff's claims against the individual Defendants in their official capacities for compensatory and punitive damages are likewise barred by the Eleventh Amendment. See Freeman v. Michigan Dept. of State, 808 F.2d 1174, 1179 (6th Cir. 1987).

The other case cited by the Plaintiff in opposition to Defendants' motion to dismiss, Kentucky Center for the Arts v. Berns, supra, concerned the question of whether the Kentucky Center for the Arts was a state agency for purposes of state sovereign immunity under Section 231 of Kentucky's Constitution. Therefore, Berns, a state case concerning state sovereign immunity, is not controlling on whether the Defendants are entitled to Eleventh Amendment immunity under the United States Constitution. Plaintiff's reliance on Berns is misplaced.

It is clear that under Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), cert. denied, 469 U.S. 1113, and its progeny, UK is entitled to Eleventh Amendment immunity. In Hall, the Sixth Circuit adopted a specific nine-point analysis contained in Blake v. Klein, 612 F.2d 718 (3rd Cir. 1979), and held that the Medical College of Ohio at Toledo was a state agency that was protected by Eleventh Amendment immunity. Further, subsequent to Hall, there is no Sixth Circuit authority denying Eleventh Amendment immunity to a state university. See Martin v. University of Louisville, 541 F.2d 1171, 1174-77 (6th Cir. 1977); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Ridder v. University of Michigan, 851 F.2d 846 (6th Cir. 1988); and Cowan v.

University of Louisville School of Medicine, 900 F.2d 936, 940-41, 941 n. 1 (6th Cir. 1990).

Additionally, the following district courts within the Sixth Circuit have relied on Hall in holding that public universities are entitled to Eleventh Amendment immunity: Depperman v. University of Kentucky, 371 F.Supp. 73 (E.D. Ky. 1974); Ewing v. Board of Regents of the University of Michigan, 552 F.Supp. 881 (E.D. Mich. 1982); Hutchins v. Board of Trustees of Michigan State University, 595 F.Supp. 862 (W.D. Mich. 1984); Jain v. University of Tennessee at Martin, 670 F.Supp. 1388 (W.D. Tenn. 1987), aff'd., 843 F.2d 1391, cert. denied, 488 U.S. 827 (1988); Kersavage v. University of Tennessee, 731 F.Supp. 1327 (E.D. Tenn. 1989); and Dillion v. University Hospital, 715 F.Supp. 1384 (S.D. Ohio 1989).

Thus, it is clear from the prevailing case law in the Sixth Circuit that UK and its agents, the Defendant police officers Sayre and Hayes, are entitled to Eleventh Amendment immunity.

B. Qualified Immunity

The individual Defendants have also moved for summary judgment on Plaintiff's claims against them in their individual capacities on the grounds that they are entitled to qualified immunity. In response, Plaintiff argues that the individual Defendants are not entitled to qualified immunity because the affidavit signed by Defendant Sayre failed to establish on its face probable cause for the issuance of his arrest warrant and that Defendant Sayre should have known at the time he prepared his affidavit that it did not establish probable cause for Plaintiff's arrest.

When state officials are sued in their individual capacities for allegedly unconstitutional actions taken by them under

color of state law, they may assert the affirmative defense of "qualified immunity." Rich v. City of Mayfield Heights, 955 F.2d 1092 (6th Cir. 1992); see also Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987). This defense provides that state "officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, supra at 818.

Siegert v. Gilley, ___ U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), provides the proper analytical framework for considering whether a defendant is entitled to qualified immunity. The Siegert Court stated:.

> . . . A necessary concomitant to the determination of whether the constitutional right asserted is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits.

114 L.Ed.2d at 287.

Discussion

Plaintiff claims that his arrest for Criminal Attempt: Rape in the First Degree violated his Fourth and Fourteenth Amendment rights because the affidavit submitted by Officer Sayre in support of an arrest warrant failed to establish probable cause for his arrest. The portion of Officer Sayre's affidavit which Plaintiff says is fatally defective is the following statement: "The Complainant advises that she was

struck from behind by an unidentified object, by a subject she later identified." Plaintiff submits that the complainant did not positively identify him prior to his arrest and that Officer Sayre knew this fact at the time he submitted his affidavit in support of an arrest warrant; therefore, Plaintiff argues that there was no probable cause to issue the warrant for his arrest.

The assault and the investigation

The undisputed evidence of record shows that on Saturday, September 22, 1990, between 1:30 and 2:00 a.m., Stacey Prieshoff, a female UK student, was assaulted on Commonwealth Drive in the vicinity of the Greg Page apartments by a man she did not know. (Prieshoff Depo., pp. 4 and 8). The UK Police Department was notified of this assault shortly after it occurred. (Huff Depo., pp. 5 and 6). Officer Sayre and Officer Hayes were dispatched to the scene of the assault. (Huff Depo., p. 7; Hayes Depo., p. 117).

Officer Sayre escorted Stacey Prieshoff to the UK Medical Center for examination and treatment of a gash in the back of her head. The gash resulted from her being struck by the assailant with "something." (Prieshoff Depo., p. 7). While at the Medical Center, she gave Officer Sayre the following description of her assailant: a black male, 5'10", 170 pounds, medium build, black short afro, stubble on his face, a ruddy complexion, no glasses, and wearing a dark jacket, light colored shirt and blue jeans. (Prieshoff Depo., p. 12).

Upon his arrival at the scene of the assault, Officer Hayes was approached by two white males, Michael Fox and Darren Birch, who had found a shoe and a wallet on the ground where the assault occurred. Officer Hayes instructed them to reposition these items on the ground where they were found.

(Hayes Depo., pp. 19-24). A white bandanna was also found at the crime scene. The shoe and the bandanna were later identified as belonging to the assault victim, Stacey Prieshoff. The wallet contained Plaintiff's driver's license and his Lexington Transit identification card that identified the wallet as belonging to the Plaintiff. Ms. Prieshoff's description of her assailant to Officer Sayre was made before Officer Hayes discovered identification cards in the wallet indicating that it was Plaintiff's wallet. (Hayes Depo., p. 125).

During the course of the investigation of this assault, Officer Hayes learned from Plaintiff's criminal history that he had a previous arrest for criminal solicitation - prostitution, among other arrests. (Hayes Depo., pp. 52 and 120). Officer Hayes subsequently obtained a photograph of Plaintiff from Lexington Metro Central Records, and then he was assisted by Detective Lynn Dalton of the Lexington-Fayette Urban County Police Department in selecting photographs of five (5) other black males who had either arrests or convictions for sexual offenses and whose physical characteristics were similar to Plaintiff's. (Hayes Depo., pp. 54, 59-60, and 120).

On Monday, September 24, 1990, Officer Hayes went to Stacey Prieshoff's apartment and presented a photographic lineup to her of six black men to see if she could identify from the photographs which, if any, of the six men shown therein was the man who assaulted her. Hayes told Ms. Prieshoff to take her time in reviewing the lineup, and Hayes remained silent during the time she looked at these photographs. Ms. Prieshoff picked Plaintiff's photograph as the one she thought most resembled her assailant; however, she told Hayes that she could not be 100% certain because it was more difficult to identify someone from a photograph than in person. (Prieshoff Depo., pp. 22-23 and 42; Hayes

Depo., pp. 68 and 130-133). Ms. Prieshoff specifically stated that Plaintiff "was the person that I felt, you know, out of the lineup, I was drawn to that picture and that I felt that, you know, he was -- he was the one." (Prieshoff Depo., p. 25). Subsequently, when Ms. Prieshoff saw Plaintiff at trial, she was "100% sure" of her identification in court and was positive that he was the person who attacked her. (Prieshoff Depo., pp. 25 and 43-44).

After Ms. Prieshoff identified Plaintiff in the photographic lineup on September 24, 1990, Officer Sayre continued his investigation of the assault. Sgt. Bobbye Carpenter and Lt. R. Abrams, detectives with the UK Police Department, re-interviewed witnesses, including the Plaintiff, who made statements inconsistent with those made during his earlier interview by Officers Hayes and Sayre. Officer Sayre also consulted with the Fayette County Commonwealth Attorney's Office during the course of his investigation of this assault and the evidence that had been obtained. Assistant Fayette Commonwealth Attorney Joe Bouvier was of the opinion that Officer Sayre's complaint established probable cause. (Bouvier Depo., pp. 18 and 23). Further, Officer Sayre had occasion to discuss this case with Fayette District Judge Thomas Clark, who reviewed the initial complaint against Hutsell and advised Sayre that the complaint was too detailed and should be shortened. Subsequently, on December 14, 1990, based on Officer Sayre's affidavit and the revised complaint against Hutsell, Judge Clark issued a warrant for Plaintiff's arrest.

Plaintiff alleges that the actions of Defendant Sayre in submitting a criminal complaint and supporting affidavit to the Fayette District Court which ultimately led to his arrest violated his Fourth Amendment rights because Sayre's

affidavit on its face failed to establish probable cause for his arrest. Plaintiff contends that Officer Sayre's affidavit falsely states that Ms. Prieshoff had positively identified him as her assailant.

Plaintiff's acquittal on the criminal charges is not determinative of the alleged Fourth Amendment violation; instead, the proper inquiry on this issue is whether a reasonably well-trained officer in Defendant Sayre's position would have known that his affidavit failed to establish probable cause and that he should not have filed the complaint and sought the arrest warrant. The standard for probable cause is reiterated in United States v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988), as follows:

> . . . Probable cause exists where "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S.Ct. 2627, 2632, 61 L.Ed.2d 343 (1979) (and cited therein). The probable cause requirement does "not demand any showing that such a belief is correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

Id. at 1508.

In view of the fact that Officer Sayre (1) conducted an investigation of Ms. Prieshoff's assault over a period of more than three months, (2) was assisted in this investigation by UK Police Department detectives Bobbye Carpenter and R. Abrams, and (3) consulted with not only the Fayette Commonwealth Attorney's Office, who at no time advised Sayre that the evidence was insufficient to pursue a criminal

complaint against Hutsell, but also Fayette District Judge Thomas Clark during the course of his investigation, Plaintiff's argument that Officer Sayre did not have probable cause to submit an affidavit in support of his arrest and to file a criminal complaint against him is without foundation.

Plaintiff submits that Officer Sayre's affidavit is fatally defective because (1) Sayre falsely stated that Plaintiff had been positively identified by Ms. Prieshoff, and (2) the affidavit does not identify him by name.

1. Plaintiff's identification by Ms. Prieshoff

Plaintiff contends that because Ms. Prieshoff could not be 100% certain from reviewing the photographs of the six black men presented to her on September 24, 1990, that he was her attacker, then Sayre falsely stated in his affidavit that he had been "later identified" by the victim. Plaintiff's argument ignores Ms. Prieshoff's statement that Plaintiff "was the person that I felt, you know, out of the lineup, I was drawn to that picture and that I felt that, you know, he was -- he was the one." (Prieshoff Depo., p. 25).

Plaintiff also contends that the photographic lineup was unnecessarily suggestive. This argument ignores the fact that Officer Sayre worked with Detective Lynn Dalton from the Lexington-Fayette Urban County Police Department to compile a photographic lineup of several black males with physical characteristics similar to Plaintiff's and with previous arrests or convictions for sexual offenses. Additionally, Plaintiff's photograph that was used in the lineup was from a previous arrest and was taken several years prior to this incident in 1990. (Hayes Depo., p. 68).

Plaintiff's argument also ignores the fact that Ms. Prieshoff's description of the physical characteristics of her assailant was made to Officer Hayes at the UK Medical

Center before Officer Sayre discovered Plaintiff's driver's license and Lexington Transit Identification card in his wallet, which was found at the scene of the assault. Logically, the physical characteristics that Ms. Prieshoff attributed to her assailant were used in compiling the photographic lineup. Further, it was logical for Plaintiff to be a suspect because his wallet was found at the assault scene.

Based on a review of the evidence, the court finds no merit to Plaintiff's argument that he was not later identified by the assault victim. The assault victim "later identified" Plaintiff in the photographic lineup from a photograph of Plaintiff that was not current; the fact that she was not 100% certain at that time is immaterial.

2. The affidavit does not identify Plaintiff by name

Plaintiff also submits that Officer Sayre's affidavit is deficient because it fails to identify him by name. This argument is based on the following sentence contained in the affidavit: "The Complainant advises that she was struck from behind by an unidentified object, by a subject she later identified." Plaintiff asserts that because he is not named in this affidavit, it fails to establish probable cause for his arrest because it does not provide enough information for the magistrate to conclude that the Complainant had identified him as the assailant.

In support of this argument, Plaintiff relies on Malley v. Briggs, 475 U.S. 335 (1986), which held that an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit is entitled to qualified immunity if the officer had a reasonable basis for believing that the facts alleged in his affidavit were sufficient to establish probable cause. Id. at 339. Plaintiff bolsters his argument by looking at the converse of this holding, viz., that a police officer is

not entitled to qualified immunity if a reasonably well-trained officer in his position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

Prior to filing his affidavit in support of the criminal complaint lodged against Plaintiff, Officer Sayre as aware of the following facts from his own investigation: (1) Plaintiff's wallet containing his driver's license and a Lexington Transit identification card was found at the scene of the assault; (2) Plaintiff could not be located by telephone at 5:30 a.m. on the morning of the attack; (3) Officer Keyes and Lt. Huff could not locate Hutsell or his vehicle at the addresses listed on the identification cards; (4) Plaintiff was not at work or scheduled to work on September 22, 1990; (5) Plaintiff has been previouly arrested for a sexual offense; (5) a photographic lineup was put together using Hutsell's old photograph from an earlier arrest and photographs of other men resembling him; (6) the assault victim identified Plaintiff's photograph from the lineup as her attacker; (7) witnesses to the assault stated that the attacker had a large object in his hand; (8) the victim stated that her attacker struck her with something; (9) a bat was found in the trunk of Plaintiff's vehicle; (10) Plaintiff's statements given to investigating officers on two separate occasions were significantly different; and (11) the alleged facts elicited from the Plaintiff in his inconsistent statements were checked and were not accurate.

Clearly, in the face of this information, Officer Sayre had probable cause to believe that Plaintiff was guilty of the offense charged and would have no reason to suspect that his affidavit failed to establish probable cause simply because he omitted to state Plaintiff's name in the body of the affidavit. During the course of Officer Sayre's more-than-three-month

investigation of this offense, he consulted with the Fayette County Commonwealth Attorney's Office before any charges were filed against Plaintiff. There is no evidence of record to even suggest that Sayre was advised during the course of his discussions with attorneys in the Fayette County commonwealth Attorney's Office that no criminal charges should be lodged against Plaintiff. It is clear that both the Commonwealth Attorney's Office, as well as the Fayette District Judge who issued the arrest warrant, believed there to be probable cause for the criminal charges. Furthermore, a Fayette County Grand Jury also found there to be probable cause for the criminal charges it filed against Plaintiff.

Consequently, the court is of the opinion that Plaintiff has no good faith argument that Defendant Sayre did not have probable cause to file a criminal complaint against him and that his arrest was made without probable cause. See Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989). In view of Officer Sayre's knowledge at the time he submitted the affidavit to support the criminal complaint against Plaintiff, the fact that Officer Sayre's affidavit omitted to state Plaintiff's name is an insignificant technicality that does not support Plaintiff's argument that there was no probable cause for his arrest. It is clear from Sayre's affidavit contained on the face of the criminal complaint styled "Commonwealth of Kentucky vs. Stanley R. Hutsell" that Sayre is referring to Hutsell as the subject who was identified by the complainant as her assailant. Plaintiff's argument on this point is without merit.

The Defendant police officers Sayre and Hayes are entitled to qualified immunity because Officer Sayre had probable cause to file a criminal complaint against Plaintiff. Consequently, since Plaintiff has failed to allege a

constitutional violation, the Defendants' motion for summary judgment on the basis of qualified immunity will be granted.

III. CONCLUSION

Based on a review of the undisputed evidence and the prevailing case law applicable to Plaintiff's federal claims, the court is of the opinion that Plaintiff's claims against UK and its agents, police officers Sayre and Hayes, are barred by the Eleventh Amendment of the United States Constitution; therefore, these claims will be dismissed.

The court is further of the opinion that the evidence collected during the investigation of more than three months established that Officer Sayre had probable cause to submit an affidavit in support of the criminal complaint filed against Plaintiff; therefore, Defendants Sayre and Hayes are entitled (sic) summary judgment on Plaintiff's claims against them in their individual capacities.

An Order and Judgment in accordance with this Memorandum Opinion will be issued on the same date herewith.

This 20th day of August, 1992.

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE

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I. INTRODUCTION

Plaintiff brings this action under 42 U.S.C. § 1983, against Ray Sayre, individually and in his official capacity as a police officer of the University of Kentucky Police Department; W. A. Hayes, individually and in his official capacity as a police officer of the University of Kentucky Police Department; and the Board of Trustees of the University of Kentucky ("UK"). Plaintiff alleges that the Defendants violated his constitutional rights in respect to the manner in which they investigated an assault occurring to a UK female student on September 22, 1990, resulting in

Plaintiff being charged by a Fayette County Grand Jury with Criminal Attempt: Rape in the First Degree. On March 26, 1991, Plaintiff was tried by the Fayette Circuit Court and was acquitted by the jury on this offense.

Plaintiff alleges that the manner in which the Defendants investigated the assault of the UK female student on UK's campus on September 22, 1990, subjected him to an unreasonable seizure of his person without probable cause in violation of his Fourth and Fourteenth Amendment rights and resulted in his having to employ counsel to defend him in the criminal action in Fayette Circuit Court. Plaintiff seeks $100,000.00 in compensatory damages, reimbursement of the $2,500.00 in attorney's fees he incurred in defending the criminal action, punitive damages of $50,000.00, and his costs and attorney's fee.

This matter is before the court on the Plaintiff's motion to certify questions of state law to the Kentucky Supreme Court concerning whether UK is entitled to immunity from suit under state sovereign immunity. This motion is fully briefed and is ripe for consideration.

II. PLAINTIFF'S MOTION TO CERTIFY QUESTIONS

Plaintiff has moved, pursuant to Kentucky Rule of Civil Procedure 76.37, to certify the following two questions to the Kentucky Supreme Court:

A. Would the Board of Trustees of the University of Kentucky be answerable for damages in an action brought under 42 U.S.C. § 1983 in a circuit court of Kentucky in light of the defense of state common law sovereign immunity?

B. Is the Board of Trustees of the University of Kentucky "the state" as defined in Kentucky Center for the Arts v. Berns?

Plaintiff's motion to certify these questions to the Kentucky Supreme Court is premised on Kentucky Center for the Arts v. Berns. Ky., 801 S.W.2d 327 (1991), which restricts the concept of state sovereign immunity by more narrowly defining "the state." Plaintiff submits that in light of Berns and Howlett v. Rose, 496 U.S. 356 (1990), it is uncertain whether UK still enjoys sovereign immunity as an arm of the state.

In objecting to the Plaintiff's motion to certify, the Defendants contend that Berns did nothing to eliminate UK's sovereign immunity and that Rooks v. University of Louisville, Ky. App., 574 S.W.2d 923 (1978), which was cited in Berns with approval, and Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609 (1990), indicate that UK's state sovereign immunity remains intact. Furthermore, the Defendants submit that UK's immunity is under the Eleventh Amendment, which is governed by federal law, not state law, as seen in the seminal case of Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984); therefore, Defendants contend that Plaintiff's motion to certify questions of state law to the Kentucky Supreme Court regarding UK's state sovereign immunity is without foundation.

Discussion

A. Sovereign immunity under Kentucky's Constitution

Berns reiterated the two-part test for sovereign immunity, as set out in Gnau v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 346 S.W.2d 754 (1961). Sovereign immunity applies only to those agencies "which are

under the direction and control of the central State government" and "are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State Treasury." Berns, 801 S.W.2d at 331.

1. Direction and control of the central state government

It is clear from the numerous statutes set out in Chapter 164 of the Kentucky Revised Statutes that UK is under the direction and control of the central state government.

2. Supported by monies from the state treasury

KRS 164.020(4)(c) requires that each funding request by an institution of higher education be reviewed by the Council on Higher Education, which shall make a recommendation thereon to the governor. UK's budget is submitted and approved by the legislature as part of the governor's executive budget. Once the budget is passed, UK receives its appropriation from the state treasurer in the following manner:

> The secretary of finance and administration cabinet shall issue warrants authorizing the treasurer of the Commonwealth of Kentucky to pay to the treasurer of [UK] any amounts due by virtue of the state appropriation. . .

KRS 164A.555. Thus, it is also clear that UK is supported by monies which are disbursed by authority of the Commissioner of Finance out of the State Treasury.

Applying the two-part test for sovereign immunity to UK, the court concludes that UK is an "arm of the state" that is immune from suit under Section 231 of Kentucky's Constitution.

B. Eleventh Amendment immunity

The leading case on Eleventh Amendment immunity is Hall v. Medical College of Ohio at Toledo, supra, which adopted the nine-point analysis contained in Blake v. Klein, 612 F.2d 718 (3rd Cir. 1979). Subsequent to Hall, the decisions in the Sixth Circuit have consistently held that a state university is entitled to Eleventh Amendment immunity. See Martin v. University of Louisville, 541 F.2d 1171 (6th Cir. 1976); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Ridder v. University of Michigan, 851 F.2d 846 (6th Cir. 1988); and Cowan v. University of Louisville School of Medicine, 900 F.2d 936, 940-41, 941 n.1 (6th Cir. 1990)

Further, the following district court decisions conclude that under Hall public universities are entitled to Eleventh Amendment immunity: Depperman v. University of Kentucky, 371 F.Supp. 73 (E.D. Ky. 1974); Ewing v. Board of Regents of the University of Michigan, 552 F.Supp. 881 (E.D. Mich. 1982); Hutchins v. Board of Trustees of Michigan State University, 595 F.Supp. 862 (W.D. Mich. 1984); Jain v. University of Tennessee at Martin, 670 F.Supp. 1388 (W.D. Tenn. 1987), aff'd., 843 F.2d 1391, cert. denied, 488 U.S. 827 (1988); Kersavage v. University of Tennessee, 731 F.Supp. 1327 (E.D. Tenn. 1989); and Dillion v. University Hospital, 715 F.Supp. 1384 (S.D. Ohio 1989).

Thus, it is clear from the prevailing case law that UK is also entitled to Eleventh Amendment immunity.

III. CONCLUSION

Based on a review of recent state decisions regarding sovereign immunity, the court is of the opinion that UK as an arm of the state continues to enjoy sovereign immunity under Section 231 of Kentucky's Constitution. Kentucky Center for the Arts v. Berns, supra, may more narrowly define the scope

of sovereign immunity but it does not encroach upon UK's sovereign immunity. Therefore, there is no reason to think that if the Kentucky Supreme Court were presented with the question of whether UK is a state agency that is protected by sovereign immunity, the Court would rule that it is not a state agency with no sovereign immunity.

Additionally, from a review of Hall v. Medical College of Ohio at Toledo, supra, and its progeny, it is clear that in that Sixth Circuit a state university is immune from suit under the Eleventh Amendment.

Consequently, the court concludes that there is no reason to certify Plaintiff's questions to the Kentucky Supreme Court.

Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's motion to certify questions concerning whether UK is immune from suit under state sovereign immunity to the Kentucky Supreme Court is **DENIED**.

This 17th day of August, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE